

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
EUGENE DIVISION

RONDA MCGOWAN, Personal) No. 6:17-cv-00424-MC
Representative for the Estate)
of Brian Babb, LEE BABB,)
CONNOR BABB, by and through)
his Guardian Ad Litem,)
STEPHANIE WOODCOCK, and KAYLEE)
BABB,)
Plaintiffs,)
v.)
WILL STUTESMAN, OFFICER GROSE,)
OFFICER PIESKE, SGT. MCALPINE,)
CITY OF EUGENE, a municipal)
subdivision of the State of)
Oregon, JANE DOE CALL TAKER,)
and John and Jane Does 1-10,)
Defendants.)

PRETRIAL CONFERENCE

February 11, 2020

Tuesday

9:08 A.M.

APPEARANCES

For the Plaintiffs:

AMANDA S. YARUSSO

111 West Washington Street, Suite 1500

Chicago, Illinois 60602

773/510-6198

BY: MS. AMANDA S. YARUSSO

(Appearing by Phone)

amanda@actioninjurylawgroup.com

ACTION INJURY LAW GROUP, LLC

191 North Wacker Drive, Suite 2300

Chicago, Illinois 60606

312/771-2444

BY: MR. CARLTON ODIM

carlton@actioninjurylawgroup.com

BY: MR. ANDREW M. STROTH

astroth@actioninjurylawgroup.com

TIM VOLPERT, P.C.

610 SW Alder Street, Suite 415

Portland, Oregon 97205

503/703-9054

BY: MR. TIMOTHY R. VOLPERT

tim@timvolpertlaw.com

APPEARANCES

For the Defendants:

LAW OFFICE OF ROBERT E. FRANZ, JR.

P.O. Box 62

Springfield, Oregon 97477

541/741-8220

BY: MR. ROBERT E. FRANZ, JR.

rfranz@franzlaw.comcastbiz.net

BY: MS. SARAH HENDERSON

shenderson@franzlaw.comcastbiz.net

MR. BENJAMIN J. MILLER

City of Eugene

125 East 8th Avenue, 2nd Floor

Eugene, Oregon 97401

541/682-8447

ben.j.miller@ci.eugene.or.us

Reported by:

SARA FAHEY WILSON, CSR

EUGENE 541/485-0111

TOLL FREE 800/344-0983

1 TUESDAY, FEBRUARY 11, 2020; 9:08 A.M.

2 P R O C E E D I N G S

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5 THE COURT: Why don't we go ahead and
6 go on the record. Ms. Pew, I'll have you call the
7 case.

8 THE CLERK: The United States District
9 Court for the District of Oregon is now in session.
10 The Honorable Michael J. McShane presiding.

11 Now is the time set for civil case
12 17-00424, McGowan, et al., versus Stutesman, et al,
13 pretrial conference.

14 THE COURT: All right. Let's have the
15 attorneys before me please introduce themselves for
16 the record, and let's start with Plaintiffs'
17 counsel.

18 MR. ODIM: Carlton Odum for the
19 plaintiff.

20 THE COURT: Mr. Odum, thank you.

21 MR. STROTH: Andrew Stroth for the
22 plaintiff.

23 THE COURT: Mr. Stroth, thank you.

24 MR. VOLPERT: Tim Volpert for the
25 plaintiff.

1 THE COURT: Mr. Volpert, good to see
2 you again.

3 All right. For the defendants?

4 MS. YARUSSO: And, Your Honor, this is
5 Amanda Yarusso appearing by phone for the plaintiff.

6 THE COURT: All right. Thank you. Is
7 it Yarusso? Correct?

8 MS. YARUSSO: That's correct.

9 THE COURT: Okay. All right. For
10 Plaintiff [sic]?

11 MR. FRANZ: For the defendant. Robert
12 Franz for Defendants.

13 THE COURT: All right. Good to see
14 you again.

15 Mr. Miller, we've got you.

16 MS. HENDERSON: Sarah Henderson also
17 for Defendants.

18 THE COURT: Ms. Henderson and
19 Mr. Miller. All right. Thank you.

20 Well, we have a lot of rulings to go
21 through. I'll give you a spoiler alert. Most of
22 the evidence is coming in. Really, I don't think a
23 lot of the objections were particularly meritorious
24 when it came to the evidence.

25 So I'll go through these. If you need

1 some clarification, please interrupt me. I think
2 they are pretty straightforward.

3 There are some exceptions. There's
4 some things that I may need to ask you about, some
5 things that are not coming in. But by and large,
6 both sides wanted to keep out certain kinds of
7 evidence that I think is going to be relevant for
8 the jury so a lot of it is coming in.

9 Let's start with motions in limine.
10 We have the plaintiffs' motion in limine. First is
11 Plaintiffs' motion to bar evidence of consumption of
12 alcohol or medication, including photographs taken
13 at the home, the toxicology report, restraining
14 orders, medical records and testimony.

15 There is sufficient evidence to
16 reasonably suggest that Mr. Babb was intoxicated and
17 on medication and having a mental health episode at
18 the time, that he was suicidal at the time of the
19 incident, so this kind of evidence is relevant to
20 the defense contention that he was attempting to get
21 the police to kill him, so it does have relevance
22 there.

23 It's also relevant to his health
24 habits, his sobriety, and his life expectancy, and
25 his relationship with the individual plaintiffs. So

1 when it comes to assessing damages, this is the kind
2 of evidence that typically would go to the jury. I
3 realize some of it is not good evidence, it has some
4 prejudicial affect, but it's not out weighed by its
5 probative value.

6 We'll talk about the kettle of fish,
7 or whatever that website is called, in a moment.
8 There's some questions about that.

9 Motions in limine for the defense.
10 Motion number one -- a lot of these I would not -- I
11 would certainly not be expecting the plaintiff to
12 even consider introducing the evidence. I know they
13 are somewhat prophylactic, but motion number one is
14 a reference to police actions in other locales.
15 I'll grant that motion.

16 Motion two, a reference to people
17 dying to secure the rights founded in the
18 Constitution I'll grant.

19 Motion three, putting the jury in the
20 shoes of the plaintiffs or family. Of course I'll
21 grant that.

22 Motion four, evidence that Mr. Babb
23 was a war hero. I'm going to deny that motion. I
24 think the witnesses can describe Mr. Babb's service
25 in the military and give a general background of his

1 life. I mean, there are family members who are
2 going to testify how they viewed their relationship
3 with him, who he was, and that has something to do
4 with his history and how they looked at him. And if
5 they looked at him as a war hero, that's how they
6 looked at him.

7 Motion five, testimony of non
8 plaintiff family members regarding their loss. I'll
9 deny that as well. I think they can testify
10 generally about family relationships and the impact
11 on family members who are plaintiffs. They can
12 testify to relevant character traits about
13 Mr. Babb's character as a father and a family
14 member. Of course, that would be subject to
15 specific acts of impeachment, many of which is
16 coming in anyways, quite frankly, for other reasons.

17 Motion six, expert testimony regarding
18 the reasonableness of the force used. I haven't
19 seen that there is an expert planning on making that
20 contention. But generally speaking I do not allow
21 that kind of testimony. It's really an issue for
22 the jury to decide based on their common sense and
23 judgment, and they do not need the aid of an expert
24 in determining the reasonableness of the force.

25 Then turning to exhibits. The first

1 objection is to Exhibit 201, the training records of
2 Will Stutesman. That's overruled.

3 Exhibit Number 202, the firearm
4 training records of Will Stutesman. I'm saying
5 "Stutesman." Is it's Stutesman or Stutzman
6 (phonetic)?

7 MR. FRANZ: Stutesman.

8 THE COURT: So 202, overruled.

9 207, photos of Officer Stutesman as
10 dressed that night. Overruled.

11 209, audio recording of Stephanie
12 Woodcock. So she is a party opponent, so in that
13 respect it's not hearsay.

14 Mr. Franz -- well, I tend to be
15 directing everything to Mr. Franz, probably. Are
16 you the lead counsel?

17 MR. FRANZ: Yes, Your Honor.

18 THE COURT: Okay. I'll direct things
19 at you then.

20 Mr. Franz, I think it could be
21 cumulative. I think we need to wait to see how she
22 testifies. If she testifies inconsistent with
23 what's in this audio recording, you can enter it as
24 non hearsay substantive evidence as a party opponent
25 and use it as impeachment. But if she testifies

1 consistently, it's just cumulative.

2 So I'm conditionally sustaining the
3 objection with the understanding you may move to
4 enter it at a later time.

5 Exhibit 210, restraining -- this is --
6 210 and 211 are restraining orders. Again, at issue
7 is -- with regard to damages -- is the relationship
8 between Mr. Babb and his children, and it does
9 appear from these documents that there was a concern
10 of threats to his children in the context of
11 these -- this 2006, 2007 restraining order. In that
12 respect it does have some relevance, so I will allow
13 it in.

14 215, scene photographs by Sprague,
15 overruled.

16 Exhibit 217, items returned to Ronda
17 McGowan. I'm just not sure if this rabbit hole is
18 relevant or not. I'm going to sustain at this time
19 on foundation. If a foundation is laid that there
20 could be material items that were somehow destroyed,
21 I may allow it at a later time.

22 218, Babb phone records, overruled.

23 219, discharge summary of Roseburg
24 Hospital, overruled. It is relevant to his mental
25 state going into this time frame.

1 The screen results, Exhibit 220,
2 overruled.

3 221, the overlay video with sound.
4 This gets into the expert testimony. But I am
5 overruling the objection. This is the kind of
6 technical support the jury is going to need to help
7 them determine time frames.

8 Exhibit 222, Plenty of Fish. I'll be
9 honest, I just don't understand the relevance. I
10 realize it might be a habit, but what's the habit
11 relevant to?

12 MR. FRANZ: Well, you know, that was
13 originally just coming in to show that's the only
14 thing we could get off the computer.

15 THE COURT: Well, then, sustained. I
16 mean, it seems like it might be suggesting there's
17 some moral flaw, although reading what I saw --

18 MR. FRANZ: Well, Your Honor, I'd
19 offered that for that purpose, too, that this is
20 what he was doing the last two weeks of his life.

21 THE COURT: I need to get a date.

22 MR. FRANZ: That's what it is, yeah.

23 THE COURT: That's not relevant to
24 really damages or his relationship with anybody.
25 That's just a life habit. And it suggests he had

1 some character flaw that I think is improper. So
2 222 is out.

3 223, the gun inspection photos,
4 overruled.

5 224, the Higgins exhibit, I think it
6 will come in. There would not be any privilege if
7 she testifies. My understanding is Higgins is
8 testifying. So I'll overrule the objection.

9 225, Dr. Dan Davis exhibits,
10 overruled.

11 226, investigation by Officer Hubbard.
12 I'm trying to jog my memory. Is this the
13 investigation where Officer Hubbard speaks to the
14 son -- is it Connor?

15 MR. FRANZ: Yes. The gun -- pointing
16 the gun incident.

17 THE COURT: Yes.

18 MR. FRANZ: And it would only be used
19 if Connor denies it. Connor kind of admitted it
20 pretty much in his deposition.

21 THE COURT: So it is a statement of a
22 party opponent. My only concern is if the report
23 comes in, there may be other statements by other
24 people within the report that would be hearsay so it
25 may need to be redacted.

1 MR. FRANZ: Okay.

2 THE COURT: 228, Stutesman oath, I'll
3 sustain the objection on relevance.

4 229 and 230, audio and transcript of
5 Jim Antonini interview, it may come in if
6 Mr. Antonini testifies inconsistent with the
7 recording, and the transcript may be used as
8 impeachment in that case. But it would not come in
9 as substantive evidence at this time.

10 MR. FRANZ: A couple of questions,
11 Your Honor.

12 THE COURT: Yes.

13 MR. FRANZ: Can we use the overlay
14 from the very beginning of the trial? Or do we have
15 to wait until our video expert testifies?

16 THE COURT: You may use the overlay.

17 MR. FRANZ: Okay.

18 THE COURT: I mean, we need to be able
19 to assist the jury in understanding time frame, so
20 whether you're using it -- I mean, do you have a
21 pictorial of the time frames? Is that what you want
22 to use? Or are you wanting to play it right away?

23 MR. FRANZ: Well -- okay, my plan
24 would be with the particular officers to play it to
25 show which officer is doing what at what time. And

1 then to say, Okay, for example, start off with
2 Mr. Stutesman maybe from the time of the shooting
3 until the BearCat moves forward, and then that
4 elapsed time --

5 THE COURT: That's fine.

6 MR. FRANZ: -- and then what the sound
7 was at the same time so the jury can hear -- we have
8 the ability to turn off each track so we can play it
9 no sound, one track, or the third track. And the
10 two tracks -- other tracks being the dispatch tape
11 and the ICV unit of DeWitt.

12 THE COURT: That's fine. I'm finding
13 it admissible.

14 You're going to have to put on your
15 expert at some point to talk about the data he used
16 to create this and he's then subject to
17 cross-examine to challenge any of that data. And
18 the jury will get to decide just how much weight
19 they want to give the evidence. I think this is the
20 kind of evidence we want the jury to have to help
21 them understand. Now, it can be challenged in terms
22 of its accuracy, but I'm not finding that it's
23 unreliable under some scientific --

24 MR. FRANZ: And then on the audio of
25 Stephanie Woodcook, can I use that without any

1 further foundation, or do I have to bring OSP
2 detectives in who took the statement? Because it's
3 her voice on it. She can authenticate it. It's her
4 voice.

5 THE COURT: I would expect that to be
6 the case, that she would authenticate it. You don't
7 need anything further.

8 And I will say that any exhibit that
9 has not been objected to or that I've overruled the
10 objection is deemed admitted for both sides. Okay?

11 MR. ODIM: Your Honor, one point of
12 clarification.

13 THE COURT: Yes.

14 MR. ODIM: The concern I have about
15 using the overlay is a concern relating to whether
16 or not the person who put that overlay together in
17 fact gets on the witness stand. I mean, I hope that
18 if Mr. Franz uses it that he is committing himself
19 to produce that witness.

20 THE COURT: He is.

21 MR. FRANZ: But we wanted to do it by
22 phone. He's the gentleman --

23 THE COURT: Oh, right, right, right.
24 And we're able -- we're going to be able to connect
25 him via video. We're working on that.

1 So Dan Philpott [sic] is our IT
2 person. I am going to allow him to testify by --
3 via video or phone. But, Mr. Franz, you need to
4 work with Mr. Philpott. But he's going to set up a
5 particular software that will allow us to bring him
6 up to the screens and he can testify from his home.
7 But I am finding that he is having a family hardship
8 in which it would be difficult for him to testify in
9 person. But he does need to testify -- to talk
10 about the data and be subject to cross-examination
11 about the data he used.

12 So now the defense exhibits [sic] to
13 Plaintiffs' exhibit list. There's objections to
14 Exhibit 3, 4, and 5. Those are overruled.

15 Objections to 15 and 18 overruled.

16 Objections to Exhibits 22 to 27
17 overruled.

18 Objections to the photographs, 13, 14,
19 30, 31, 32, and 34, it did seem to me that 30 and 32
20 are cumulative, so I would sustain an objection at
21 this time to them. Otherwise, I would overrule the
22 objection. So 13, 14, 31, and 34 would come in.

23 Now, if there's -- you know, somebody
24 is going to testify that 30 and 32 have some more
25 significant relevance then you can move to enter

1 them at that time. But it just seemed like one was
2 a little further away and one was a little bit
3 closer. And all of them show that there's no
4 firearm within the context of Mr. Babb.

5 39, this is the event report. It does
6 seem to put things into some sort of chronological
7 order including the fact that these shots have been
8 fired, so I wasn't -- I was trying to read it. It
9 was a little -- I read it a couple of days ago now.
10 And I'm trying to remember, are there particular
11 statements within the event report that you're
12 concerned about from the defense perspective?

13 MR. FRANZ: I think there was one
14 statement -- let me see. I just didn't want to
15 allow the -- to open the door to the subsequent
16 investigation by iFit. And I think there was
17 something in here that -- about an auditor, or
18 something, so -- I don't mind it as long as we're
19 not considered opening the door to the investigation
20 done by OSP and iFit.

21 THE COURT: Okay. We're going to need
22 to -- talk about that more. My inclination is to
23 not let that investigation in. I guess I kind of
24 assumed the plaintiff did not want the investigation
25 in, but now I'm not completely clear.

1 Is it your contention that the
2 investigation that seems to exonerate Officer
3 Stutesman that, I believe, said the homicide was
4 justified should come in or should not come in?

5 MR. ODIM: Not the investigation, per
6 se. We don't want to use it for the justification
7 of the force. We want to use it as evidence of post
8 event cover-up. That is the failure to -- the
9 failure of the officers to clarify their statements
10 in a timely way; the failure of the investigators to
11 clearly look at and run down obvious inconsistencies
12 that might have produced, you know, relevant --

13 THE COURT: So are you wanting the
14 report in, or is it your plan to cross-examine from
15 the report?

16 MR. ODIM: We don't want the report
17 in. We simply want to use verbal statements as
18 statements made -- non hearsay statements that were
19 at some point made.

20 THE COURT: Okay. All right. That
21 makes sense.

22 So my understanding with respect to
23 39, it's primarily being introduced just to show the
24 sequence of when certain statements were made, like
25 the shot fired.

1 MR. ODIM: That's correct.

2 THE COURT: I'll allow 39 with the
3 understanding it does not open the door for this
4 report to come in in total, but the report may be
5 used to examine some of the witnesses of what they
6 did or did not do, what they said or did not say.

7 Exhibit 40 is summary statements of --
8 taken by unknown officer. I think foundation is
9 going to have to be laid before 40 would come in.
10 Otherwise, it does look to be hearsay. So I'll
11 sustain the objection at this time with the
12 understanding a foundation may be laid later.

13 41, I may need help with that. I
14 assume 41 was the report of the deadly force review
15 board, or is it more limited than that?

16 MR. ODIM: The -- again, we have the
17 reduction of the statement -- the verbal statement
18 that I want to introduce on that one page. So it's
19 the statement itself --

20 THE COURT: All right.

21 MR. ODIM: -- from that one page which
22 we're seeking to introduce, not the paper itself.

23 THE COURT: I probably should have
24 looked at 41 instead of assumed what it was. All
25 right.

1 Are you going to have some witness to
2 lay a foundation for this page?

3 MR. ODIM: Yes.

4 THE COURT: Okay.

5 MR. ODIM: The witness scheduled on
6 that is Jennifer Bills.

7 MR. FRANZ: The problem is, Your
8 Honor, Jennifer Bills was not at the scene so I
9 don't see how they bring someone to make a statement
10 about something they didn't -- don't have personal
11 knowledge.

12 THE COURT: Well, are the witnesses
13 that she's referencing here going to testify?
14 Because otherwise it seems to me it's hearsay, that
15 she's just -- you know, we're just introducing
16 statements made to someone else.

17 But if they are going to testify and
18 they testify inconsistently with this, it seems to
19 me it would come in.

20 MR. ODIM: To be clear, the verbal act
21 -- the verbal statement that we're looking to
22 introduce is in the third paragraph, and it's the
23 last sentence. And it says quote, Babb fell to the
24 ground inside the door frame, dropping the rifle.

25 And that is -- that is the verbal act

1 that we consider relevant.

2 THE COURT: And that's a statement of
3 Officer Stutesman. Correct?

4 MR. ODIM: No. That's the statement
5 of the deadly force review board of which Jennifer
6 Bills was the chairman.

7 THE COURT: Right. But doesn't it say
8 Officer -- it begins by saying Officer Stutesman
9 stated, and then -- which would be a statement of a
10 party opponent and it would come in as non hearsay?

11 MR. ODIM: I'm sorry, I've missed
12 the -- that -- Officer Stutesman says he observed.

13 THE COURT: So if we're talking about
14 the third paragraph, and that's what you are hoping
15 to introduce, it seems to me that this is a
16 statement, including "Babb fell to the ground inside
17 the door frame, dropping the rifle," of Officer
18 Stutesman, so it would come in as his statement.

19 MR. FRANZ: It's not Officer
20 Stutesman's statement.

21 MR. ODIM: Yeah. And so the -- the
22 point ultimately is that the prior statements made
23 by the officers was that Babb fell to the ground
24 with a rifle in his right hand. But the statement
25 of the deadly force review board in issuing its

1 report was that the rifle dropped. And it is that
2 inconsistency that this verbal statement intends to
3 contrast.

4 THE COURT: But where did that
5 statement come from? I mean, I think you're going
6 to have to establish where that statement came from.
7 Otherwise, we're just having a non witness make a
8 finding. How do we test that without knowing who
9 said it?

10 MR. ODIM: Well, Your Honor, that's
11 the point.

12 Jennifer Bills was presented with a
13 PowerPoint by the lead investigator. One of those
14 PowerPoint slides contains the language that Babb
15 fell back with a rifle in his right hand. Yet, in
16 spite of -- that's the only data that we have that
17 appears to have been presented to the board. Yet,
18 in spite of that, the final report says he dropped
19 the rifle.

20 Now, I want to ask Jennifer Bills how
21 did you get from point A to point B.

22 THE COURT: Okay. I'll let you
23 explore that. Thank you. So I'll overrule the
24 objection.

25 MR. FRANZ: Well, Your Honor, just to

1 make it clear. The lead investigator was OSP, so
2 what OSP tells Bills is hearsay.

3 THE COURT: Well, I think he gets to
4 explore where that came from and why -- I mean, why
5 is that in the report. She may just say it's a
6 mistake.

7 MR. FRANZ: Well, it's not a mistake.
8 I'm not even sure she made that statement.

9 THE COURT: Well, I think they get to
10 explore why there seems to be an inconsistency in
11 this report with what the witnesses are saying.
12 It's not a huge inconsistency, and it may not go
13 anywhere, or it may, but I think they get to explore
14 it and use the exhibit. So I'll allow it.

15 MR. FRANZ: Another thing, too, is
16 everything else going to be redacted?

17 THE COURT: I assume so.

18 MR. ODIM: Yes. All I want is that
19 verbal statement.

20 THE COURT: Let's redact the rest of
21 it then.

22 Exhibit 42, I think you're going to
23 have to lay a foundation for that as well. If it is
24 a statement of Stutesman and he adopts it or if some
25 other witness can clarify that it's his statement it

1 would come in. So 42 is subject to a foundation.

2 Exhibit 43 and 44, overruled.

3 I think that covers exhibits.

4 And then there's objections to
5 witnesses. So let's start with defense objections
6 to Plaintiff witnesses. First, there's Lee Babb.
7 He's the father of Brian Babb. Plaintiff agreed to
8 certain limitations. With those, I'll -- he may
9 testify, understanding the limitations that the
10 plaintiff agreed to.

11 There's an objection to the testimony
12 of Becky Higgins. Overruled. She may testify about
13 the facts surrounding her phone calls with Mr. Babb
14 both with the 9-1-1 and with him and her
15 relationship with him in general.

16 MR. FRANZ: Your Honor, you know, all
17 the information that she received -- is she limited
18 just for the information she received from Brian
19 Babb? So she said a lot of other things that were
20 not conveyed to the officers and she conveyed her
21 own thoughts.

22 THE COURT: Who is she conveying them
23 to?

24 MR. FRANZ: She's talking to some
25 operator, 9-1-1. That's one conversation. Then

1 dispatch is relaying part of that to the officers.
2 Everything she's saying to dispatch is not going to
3 the officers. But if she's going to testify as to
4 what Babb told her --

5 THE COURT: I mean, my thought is
6 she's going to testify as to what Babb is telling
7 her on the phone and what she's trying to convey to
8 the police about what's going on. And the jury will
9 -- I mean, obviously you're going to want to clarify
10 only if pieces of this were conveyed to the actual
11 officers at the scene.

12 I think it would be difficult to try
13 to narrow in on what specifically she's going to say
14 she said that was then forwarded to the officers at
15 the scene so --

16 MR. FRANZ: We know exactly what was
17 forwarded to the officers on the scene because we
18 have the dispatch tape.

19 THE COURT: But she doesn't. How is
20 she going to testify to that? Can you just testify
21 as to what you told the officers that got forwarded
22 to the scene? What's in there that she said that
23 didn't get forwarded that's particularly
24 prejudicial?

25 MR. FRANZ: I have no problem if it's

1 just what Babb said. If she's just going to relay
2 what Babb said, I'm fine.

3 MR. ODIM: She is a fact witness, and
4 this is the start of the event. The whole context
5 includes what she said and what was transmitted
6 about what she said.

7 THE COURT: I agree. I'll allow in
8 the testimony.

9 There's an objection to Dustin
10 Sprague. He's the lead investigator into the
11 shooting. It's overruled.

12 There's an objection to David Silano
13 testifying. Overruled. He can testify about the
14 presence and location of a 9 millimeter handgun.

15 MR. FRANZ: Your Honor, can I touch on
16 that issue?

17 THE COURT: Yes.

18 MR. FRANZ: So Becky Higgins tells
19 dispatch that he has a 9 millimeter to his head.
20 Okay? Now, they want to show that the 9 millimeter
21 was in the pickup. Officers aren't told that the
22 9 millimeter is in the pickup. What relevance does
23 that have? That something's they absolutely did not
24 know. But it proves Mr. Babb is lying?

25 THE COURT: It's unclear to me what --

1 the relevance of it. From what I'm hearing, there's
2 a 9 millimeter gun involved in a shooting. I kind
3 of assume there's some relevance.

4 But what is the relevance of the 9
5 millimeter?

6 MR. ODIM: Well, we don't -- the post
7 shooting investigation appeared to conclude
8 definitively that he had shot -- Babb had actually
9 shot a 9 millimeter pistol in his house in the hours
10 preceding -- or the hour or two preceding the
11 presence of the police. Well, we don't think that's
12 the case. We think that he hadn't shot anything.
13 That 9 millimeter pistol that he allegedly shot was
14 in the truck.

15 And this gets back to the question of
16 imputing to Babb behavior that he didn't exhibit,
17 not following up clear inconsistencies in regard to
18 the investigation, so it's part of the whole scene
19 and so it's relevant in that respect. It's not
20 frivolous in that sense.

21 THE COURT: All right. I'm going to
22 allow it.

23 Lieutenant Jennifer Bills, how limited
24 is her testimony going to be?

25 MR. ODIM: She is primarily very

1 limited, and it's on that verbal statement in the
2 report.

3 Point of clarification, though. One
4 of the reports actually says that Jennifer Bills was
5 at the scene with Sprague. This statement that she
6 wasn't at the scene is incorrect. So if she opens
7 the door to something, then who knows.

8 THE COURT: All right. I mean, I
9 think -- well, I'm going to allow her testimony.
10 She can certainly as to that specific statement in
11 the exhibit that we discussed earlier. And any
12 further testimony is going to just have to be
13 subject to ad hoc objections.

14 I don't think I can look at her
15 testimony as a whole right now and start determining
16 what she can and can't say. A lot of it's going to
17 depend on whether there are any inconsistent
18 statements she can talk -- speak to or whether she
19 was at the scene. But at least it sounds like right
20 now it's somewhat limited to the statement in the
21 exhibit that's been referenced.

22 MR. FRANZ: So as my cross-examination
23 I can't -- can I go and say, Okay, did the board
24 find it was justified? Yes.

25 THE COURT: No. I mean, I really

1 don't want these other boards -- I mean, in any kind
2 of civil case there's often some other board, Bureau
3 of Labor and Industry, making findings that I would
4 never allow in because I don't want the jury to
5 decide, well, some important group has already
6 decided this issue for us, so why should we? So
7 generally speaking I don't allow in those kinds of
8 findings.

9 If we start fighting about that, then
10 we start bringing in the DA and their findings. We
11 start bringing in any group that decided that they
12 wanted to review what occurred and make a finding.
13 So I don't want the jury's decision being supplanted
14 by that.

15 Stephanie Babb, Brian Babb's mother,
16 the plaintiff has agreed to withdraw her as a
17 witness.

18 Ronda McGowan, Brian Babb's sister,
19 I'll overrule the objection.

20 Then Plaintiffs' objections to defense
21 witnesses.

22 Defendant William Stutesman, I'll
23 overrule the objections. He may testify to his
24 training and may reference relevant sections of
25 Exhibit 203, the dispatch recording.

1 Other objections regarding hearsay and
2 proper opinion evidence really, I think, have to
3 just be made at trial because I just don't have
4 enough context to know how to rule on those right
5 now.

6 The testimony of Matthew Grose is
7 overruled.

8 Objections to the testimony of Nathan
9 Pieske is overruled.

10 Joseph Kidd, overruled.

11 Derek Dewitt, overruled.

12 Sergeant McAlpin, overruled.

13 Scott Vinje, overruled.

14 There's objections to the testimony of
15 Judson Warden specifically with that witness
16 referencing Exhibit 216. If relevance is
17 established at trial, I'll rule then. There may be
18 an objection. But -- so I'm overruling at this time
19 with the understanding that if there's not a
20 relevant reference to Exhibit 216, I'll sustain at
21 that time.

22 The testimony of Dr. Daniel Davis, I
23 don't think anybody would be surprised that the
24 medical examiner was available to testify at trial.
25 His report was available. Plaintiff did attempt to

1 confer on this issue back in August. So I'm not
2 going to sustain any objections to his testimony on
3 technical grounds. So I will allow him to testify.

4 I guess, Mr. Franz, I mean, this isn't
5 exactly a cause of death case and you have
6 Dr. Freedman. I mean, is Dr. Davis testifying just
7 to establish that they photographed and tried to
8 preserve the trajectory of the bullet and
9 Dr. Freedman is then going to testify from there? I
10 mean, the entire autopsy report, it seems a little
11 overkill in a case where this isn't a who done it or
12 how did it occur.

13 MR. FRANZ: We're not going to
14 introduce the autopsy report.

15 THE COURT: Okay.

16 MR. FRANZ: Just the lab findings on
17 intoxication.

18 THE COURT: Correct.

19 MR. FRANZ: And then the direction of
20 the bullet went here. The bullet came out of here.
21 And so that if you take it -- you can -- the jury
22 can just decide what they want to do with the head.
23 They can take the head like this, which points like
24 it's down aiming, and they can put the head wherever
25 they want. These guys aren't going to tell them if

1 you put a pin through it, here's where the bullet
2 went and came out. Twist the head however you want.

3 THE COURT: Okay. I'll allow his
4 testimony.

5 There's objections to testimony of
6 Maggie Peyton, James Antonini, Stephanie Woodcock.
7 They may testify to any prior acts that are relevant
8 to life expectancy, habits, health, industry,
9 sobriety, and thrift.

10 So they can testify to some of these
11 issues around alcohol use. Mental illness. There's
12 issues around the restraining orders and use of
13 firearms. Plenty of Fish is out, but otherwise I
14 think the probative value of these prior acts
15 outweigh the prejudicial effect because they really
16 do go to the heart of damages in the case.

17 MR. ODIM: Clarification, Judge.

18 THE COURT: Yes.

19 MR. ODIM: Is the defense barred from
20 eliciting testimony about Plenty of Fish?

21 THE COURT: Yes.

22 MR. ODIM: How did you meet Brian
23 Babb. Right?

24 MR. FRANZ: Well, Maggie would say she
25 met Brian Babb on Plenty of Fish.

1 THE COURT: How about we just say
2 social website. Plenty of Fish just sounds -- I
3 don't know -- I don't know if it's -- somebody told
4 me it's a religious website with the whole fish
5 thing, but it sounds to me like that terrible overly
6 white male statement of there's plenty of fish in
7 the sea. It's sound very anti-women, and I don't
8 think he should be held to that. So, right, she can
9 testify she met him online or on social media.

10 There's an objection to Linda Realls
11 (phonetic). It may be that her in-court statement
12 will be inconsistent with her deposition testimony.
13 That doesn't mean she can't testify. That means you
14 can impeach her with any of her inconsistent
15 statements, so I'll overrule.

16 MR. ODIM: Before we move from
17 Ms. Realls, there is a matter that has arisen in the
18 last week.

19 MR. STROTH: We've got information
20 from the witness -- I don't know if you want to talk
21 in sidebar or in open court -- that the opposing
22 counsel has potentially intimidated or tried to
23 intimidate this witness to potentially change her
24 statement in the last two weeks.

25 MR. FRANZ: That's completely false.

1 MR. STROTH: We have email
2 correspondence from the witness specifically saying
3 those types of things.

4 THE COURT: Well, those are often just
5 ripe issues for examination. And my guess is it
6 would be relevant. You could present it to her if
7 she -- whether she -- the jury will determine
8 whether it was reasonable or not that she felt
9 intimidated by any communication with any attorney
10 about her testimony.

11 So, I mean, that goes towards bias,
12 motivation to lie, all those kinds of issues that
13 are going to be relevant, and it's certainly subject
14 to argument.

15 MR. STROTH: Okay. That's fine.
16 Thank you.

17 THE COURT: There's an objection to
18 Detective Dustin Sprague. I'm going to overrule
19 those objections. He may testify about evidence
20 that is relevant to the issue of whether Mr. Babb
21 was planning on committing suicide.

22 There is an objection to the testimony
23 of Eric Hubbard, and this has to do with the
24 incident where Brian Babb allegedly pointed a
25 handgun at Connor Babb. So I'm denying in part,

1 granting in part. It may be that Connor Babb will
2 admit to the incident, but otherwise his statements
3 would come in as a party opponent. But if there are
4 statements of a non party, those would be hearsay
5 unless they testify.

6 So keep that in mind, that if the
7 report is going to come in, and Mr. Hubbard is going
8 to testify, he may have to limit his investigation
9 to what he was told by Connor. I think that's the
10 salient piece.

11 Okay, that gets us into the motion to
12 bar experts. Primarily I'm going to focus on the
13 defense exhibits. I think the plaintiffs' experts
14 are -- a lot of it just depends. It's just
15 rebuttal, right? I mean, those would come in to
16 really testify about the accuracy of the data
17 collected by the plaintiff -- defense witnesses.

18 So the first defense witness is Joseph
19 Craig. He's gathered information from the scene,
20 from witnesses, and from his various measurements,
21 along with data obtained by Mr. Kluse (phonetic).
22 He does a couple of things. He creates a 3-D
23 software -- or uses a 3-D software program to create
24 a depiction of the scene. And he's using stand-ins,
25 and based on measurements and witness testimony, he

1 attempts to reenact certain aspects of the incident.

2 A lot of this is to determine who
3 could see what at particular times, of whether the
4 video in the bobcat, which doesn't appear to show
5 anybody in the doorway, is as accurate as what a
6 human being would see if they were looking towards
7 the doorway at a certain measurement.

8 None of this is remarkable. I mean, I
9 guess it's a little more high tech than what we had
10 when I was an attorney but, I mean, I did bring in
11 nontechnical investigators to create reenactments of
12 the scene based on measurements and data to create a
13 re-creation of the scene. Of course, then it was
14 drawings and photographs and actual 3-D
15 representations to tables.

16 The only thing unique about this is it
17 uses some software to create a reenactment, and
18 there's really no challenge to the software itself.
19 I mean, Mr. Craig is trained in this area. He's an
20 expert in creating these things. I don't think it
21 takes expert -- you can have high school kids
22 recreate a scene. I mean, this is just -- what's
23 significant is is the data reliable, and in his
24 report he certainly has put forth enough information
25 in this record to show at least by a preponderance

1 that he was using reliable data allowing him to
2 testify.

3 Now, he's certainly subject to
4 cross-examine about the reliability of the
5 information he was using, and certainly rebuttal
6 experts can testify that his measurements are wrong,
7 he placed people in the wrong spot, those kinds of
8 things.

9 So I'll allow him to use the data.
10 I'll allow him to testify about what people could
11 have seen from certain vantage points. The one
12 thing I will not allow him to testify, though, is
13 that there was -- his opinion that there was not an
14 opportunity for the police to covertly plant the
15 rifle. That's going to be a factual determination
16 for the jury.

17 He can certainly testify about where
18 people were and what kind of time frame is elapsing
19 for the jury to make that decision, but I think
20 that's a decision for the jury and not really the
21 province of any kind of expert.

22 Furling Cross (phonetic) used standard
23 forensic tools searching Mr. Babb's computer. He
24 may testify to what was found as long as it's
25 relevant to any issue in this case.

1 Now, I guess I'm maybe not clear
2 exactly what he found. He was searching
3 specifically for anything having to do with suicide
4 which would be relevant, but am I right the only
5 thing that was found was the Plenty of Fish?

6 MR. FRANZ: Yeah. So we're not going
7 to use him then if we don't have to establish Plenty
8 of Fish.

9 THE COURT: Okay. So he's not going
10 to be testifying.

11 Doug Carner, he's qualified in the
12 field of audio video forensics, and using accepted
13 software he's created a synchronized overlay of the
14 various audio and video records made at the time of
15 the incident. His credentials allow him to do this.

16 Again, certainly the data can be
17 challenged but, I mean, using this kind of
18 information is what a jury needs to help them
19 determine what happened when. It would be very
20 difficult to present this to the jury, these
21 different recordings, all with their own time
22 stamps, as separate issues.

23 I mean, at the very least, if you
24 hadn't had an expert, I would be telling you -- each
25 of you to create your own time line based on the

1 information you have from these various recordings
2 for the jury to look at.

3 I think Doug Carner accomplishes that,
4 at least from the perspective of the defense time
5 line.

6 Now, other experts can testify that
7 it's incorrect in terms of its timing, but I'll
8 allow the testimony.

9 Dr. Freedman, he's a medical doctor
10 with extensive experience with gun shots in an
11 emergency room setting. I think he can testify
12 about the trajectory of the gun shot. I guess I'm a
13 little concerned with him -- and that the head was
14 tilted.

15 I guess I'm a little concerned with
16 him testifying that it's consistent with somebody
17 holding a rifle to their shoulder. It seems to me
18 that he's -- he's just saying, Yep, it could have
19 happened that way. It's really a jury issue to
20 determine, I think, whether Mr. Babb was or was not
21 holding a rifle. That really goes to the heart of
22 the case.

23 I think he's going to be able to
24 testify enough in terms of the position of the head
25 and the trajectory of the bullet for the defense to

1 argue the consistency with their theory that
2 Mr. Babb was holding a rifle, but I'm not going to
3 allow him to opine what Mr. Babb was doing at the
4 time.

5 MR. ODIM: Judge, may I make an
6 observation?

7 THE COURT: Yes.

8 MR. ODIM: On the question of
9 trajectory, there are two quantum of trajectory if
10 we can quantify. There's a trajectory by units from
11 the bullet, to the body, to the skin, and there's
12 the trajectory of the bullet from the skin into the
13 anatomy, into the body.

14 Is the trajectory that the Court is
15 talking about just trajectory from the moment the
16 bullet struck the body?

17 THE COURT: Yes.

18 Now, I haven't seen that he's done
19 some forensic analysis with lasers, for example,
20 which is what we would typically see to show the
21 trajectory of where the bullet was fired from. I
22 mean, obviously we're going to have testimony where
23 Stutesman was, I assume, at the time that it was
24 fired, but the trajectory is within his limited
25 range of expertise and what he looked at. But I

1 haven't heard anything that he set up lasers and did
2 that kind of analysis.

3 Thank you for clarifying that.

4 Okay. Anything else with regard to
5 evidence? I know there was a lot there. We'll
6 certainly get a minute order with the specifics.

7 MR. ODIM: There is one general
8 matter. I don't know that it's controversial. But
9 having said that, surprises always occur during
10 trials.

11 There are extensive admissions in the
12 answer to the complaint that the plaintiff intends
13 to rely on during trial. There are over 70
14 specifically itemized admissions that are prefaced
15 with the phrase "Defendants admit that."

16 To the extent that Counsel and I can
17 talk and sort of avoid my having to object to an
18 attempt to change the judicial admissions, I hope
19 Counsel and I will be able to do that, but Plaintiff
20 intends to rely on those judicial admissions.

21 THE COURT: Okay. What I would
22 suggest is -- I think sometimes it can get a little
23 burdensome just to throw the pleadings at the jury
24 and say, "Look at all this," is take the specific
25 paragraphs from the complaint and follow them with

1 the specific admission that -- I assume they are
2 admitting to specific factual paragraphs within the
3 complaint?

4 MR. ODIM: That's correct.

5 THE COURT: Just create an exhibit for
6 me.

7 MR. ODIM: Right. Okay. So I'll do
8 that. I have the admissions here. I'll share that
9 with Counsel so we have our talking points. I will
10 add, subsequent to this meeting, the complaint
11 paragraphs to that, and there will be a running list
12 then.

13 THE COURT: And the jury will have an
14 instruction that evidence includes everything the
15 parties have admitted to or have stipulated to, so
16 let's get it to them in writing. I think it's
17 easier to do that than throw entire pleadings at
18 them or to just talk about them.

19 Okay. With regard to voir dire, let's
20 talk a little bit about that.

21 As you may now know, I'm coming from
22 state court for many years, I much prefer the
23 attorneys managing voir dire. You know the case
24 much better than I do. I think it gives you an
25 opportunity to have more robust discussion with the

1 jury than what we're used to in federal court.

2 Generally it's been much shorter than
3 my expectations, and that's always been a good
4 thing. Sometimes in state court it went a little
5 longer than I would have liked.

6 I'd like to pick a jury in the morning
7 the first day. I'd like to give each of you
8 basically an hour and 15 minutes to question the
9 jurors.

10 Looking at your questions, there's
11 only a few of the plaintiffs' questions that I'm
12 going to strike and that's 21, 22, 23, and 24. I
13 think I'm primarily striking them -- they are very
14 broad questions that could lead to -- the discussion
15 could go on all day, and I don't think they are
16 particularly probative of the qualifications of the
17 jury.

18 But all of your questions otherwise
19 look great. Some of them seem a little repetitious,
20 so I'm going to assume that you're going to whittle
21 them down and focus them in in your hour and 15
22 minutes.

23 But I want you to tell me if I'm being
24 unrealistic about that much time. I'm kind of
25 basing it on -- I have yet to have -- not like we

1 have tons of trials in federal court, but I've yet
2 to have one where we haven't picked a jury in the
3 morning. But you have a lot more questions than
4 most people have had, so I want to know if it's
5 realistic or not.

6 MR. ODIM: From the plaintiffs' side,
7 I think it is realistic.

8 MR. FRANZ: Can you explain how you're
9 going to seat the jury? How do you want us -- are
10 you going to do any voir dire at all?

11 THE COURT: Mr. Spalen (phonetic) will
12 get you this week just the general questions the
13 jury is going to answer, and they are what you
14 probably can expect. They are going to tell us
15 their name, what they do for a living, if they are
16 retired, what they did. What part of the state do
17 they live in.

18 And for the plaintiffs -- I mean, the
19 Eugene division is huge, by the way. I don't know
20 if you've looked at it, but we're going to have
21 people from the coast. We're going to have people
22 who are coming over the mountains. It's been a
23 little snowy so the people from Bend and Deschutes
24 County, they are going to be staying here in hotels
25 so they get antsy about -- I can just tell you that

1 they get antsy with both sides about how much time
2 is being used if it doesn't look like it's
3 productive because they really are leaving their
4 homes for a big chunk of time.

5 In some jurisdictions the entire
6 circuit is a quarter of the size of Oregon, but our
7 division is large so it means jurors are traveling
8 from small communities -- a lot of small communities
9 -- and sometimes great distances, as much as -- I
10 don't know, Char, it's got to be over 200 miles away
11 for some of them.

12 How many jurors are showing up on
13 Tuesday morning?

14 THE CLERK: I just inquired. I had
15 originally asked for a larger pool because of the
16 length of the trial.

17 THE COURT: Okay. So Ms. Pew will
18 have an idea how many jurors are going to be here.
19 If we can fit them all with chairs in front, you
20 will have a big panel here. It's a long trial. We
21 try to excuse those with hardships that are just
22 telling us I can't travel from Deschutes County
23 because I don't have a reliable vehicle. Those kind
24 of folks -- you know, hopefully we've already kind
25 of dealt with them, but -- we may have enough people

1 that we're going to have to have some people in the
2 gallery. We'll try to put as many as possible in
3 front.

4 We'll pick eight jurors. All eight
5 will stay throughout the trial and deliberate. But
6 that gives us a cushion of two jurors if we were to
7 go down to six.

8 Once you're done asking questions --
9 I'm not trying to lecture any of you or tell you
10 what you don't know -- but sometimes this confusion
11 has come up where we go into the back. I usually
12 take the attorneys then to the jury room, put all
13 the jurors in the back, and we select the eight
14 jurors. But sometimes we get back there and then
15 all of a sudden I'm hearing motions for cause.

16 So if you're done with your voir dire,
17 and you say, "I'm done. I pass this jury," that's
18 it. If you need to raise a for cause challenge, you
19 don't have to scream, "Judge, I want this juror off
20 right now." You can look at me and say, "Judge, do
21 you want to inquire as to this juror's
22 qualifications," and that's a hint to me that you're
23 raising a for cause challenge. I'll probably speak
24 to them a little bit and either remove them or not,
25 but we need to do that in the courtroom.

1 And then we'll do our peremptories.
2 You will each have three in the jury room. And then
3 we'll come out and bring the jury up.

4 Before voir dire, it would be helpful
5 to me to be able to read to the jury a neutral
6 statement of the case, so I do ask that both of you
7 to confer and present to me a very brief neutral
8 statement of the case just so they know that this
9 case is about a police shooting. This is what the
10 plaintiff alleges. This is what the defense
11 alleges. Something that simple in case it jogs any
12 memory. You know, I believe there was some media
13 coverage of this locally at least. But it might jog
14 some memory -- so that we can have those
15 discussions.

16 So I will get to you this week the
17 questions that -- the general questions that they
18 will have that they'll answer first before voir dire
19 -- before the attorney's voir dire. I'll get you
20 the general instructions that I'll give the jury at
21 the beginning of the case. What is evidence.
22 What's not evidence? Direct and circumstantial
23 evidence. Duties of jurors. Those kind of just
24 general instructions. How to assess credibility.
25 You will have those. You will know what

1 instructions I'm giving at the beginning.

2 If you want to record voir dire, it
3 does slow things down a little bit. Generally our
4 court reporters want all the jurors to have a
5 microphone in their hand. We can do it, but it does
6 require my law students to be running around with
7 microphones. And sometimes it's awkward.

8 So I prefer not to record voir dire.
9 Now, if there were some kind of challenge that we
10 need to put on the evidence, the court reporter
11 could come down immediately and we could go on the
12 record. If you tell me we want voir dire on the
13 record, we'll do it. You have a right to that. But
14 just remember there's going to be law students
15 handing out microphones before they can answer.

16 MR. ODIM: On plaintiffs' side, no
17 recording of voir dire except for issues that relate
18 to cause.

19 THE COURT: Okay.

20 MR. FRANZ: That's fine with the
21 defendants.

22 THE COURT: Next issue is jury
23 questions. I have mixed feelings about them. I
24 think they are helpful to the attorneys. They are
25 not always helpful to the case. One -- I mean,

1 invariably in my criminal cases in state court
2 somebody would say, you know, why isn't there DNA
3 evidence? Of course, you know, the prosecutor is
4 thinking, well, because we have a video recording.
5 Right?

6 So it allows you to kind of address
7 things maybe in your closing or with your witnesses
8 to calm down whatever issue a particular juror might
9 have. Sometimes the questions are very, very
10 helpful. But if the parties want -- agree to juror
11 questions, what I do is simply tell the jurors at
12 the beginning of the trial that you're not an
13 inquisitional body. We rely on the attorneys to ask
14 the questions of the witnesses. But if you have a
15 question that you feel isn't being asked that should
16 be answered, you can put it in writing. If you hold
17 it up, Ms. Pew will take it from you and show it to
18 me. If it can be asked, I'll make a copy of it and
19 you will each get it, and you can ask it if you
20 want.

21 I'll tell the jury that if the witness
22 is gone we're not going to call the witness back.
23 The only caveat is you don't get to stand up and
24 say, "I am now asking the most insightful question
25 of one of our jurors." You either ask it or don't

1 ask it without any reference to it being a jury
2 question.

3 If you're doing done with
4 cross-examination and we're in redirect and you want
5 to ask it, signal to me and you will get the chance
6 to ask it.

7 But I'll leave it up to you whether
8 you want to ask it or not. If it's objectionable --
9 you know, in a car accident case somebody might ask
10 is there insurance? -- I just tuck that away and I
11 show it to you later that somebody was concerned
12 about it.

13 So that's my general approach to jury
14 questions. I will say that short trials we don't
15 usually get any or many. This case is going to be
16 longer, and I think jurors start to get comfortable,
17 and start thinking about the evidence more, and they
18 may have questions as time goes on.

19 I don't know if in your jurisdiction
20 whether you routinely do jury questions?

21 MR. ODIM: It depends on the judge,
22 but we've had them done.

23 THE COURT: All right. If anybody has
24 a strong objection, let me know. Otherwise, that's
25 what I'm going to tell the jury and that will be the

1 process we'll use.

2 That is all I have.

3 Now, in terms of the technology in the
4 courthouse --

5 MR. STROTH: Your Honor, one quick
6 question.

7 THE COURT: Yes.

8 MR. STROTH: We like the idea of doing
9 summations, and so how would you want to allocate
10 timing as it relates to summations during the trial?

11 THE COURT: Okay, tell me a little
12 bit. I've always been curious about summations, and
13 I've asked people to do them in the past usually
14 when I'm sensing the jury is confused. But where
15 are you thinking you would do summations? Like
16 breaking up parts of the trial?

17 MR. STROTH: Well, there's natural
18 breaks during certain key testimony that we think
19 would be a natural opportunity for us to tell the
20 jury what they just heard to make sure there's
21 clarity.

22 MR. FRANZ: I object.

23 THE COURT: Okay. So you're talking
24 about summations after the fact, not the following
25 witnesses -- we're now shifting -- you know, often

1 it's the plaintiffs, we're now shifting to issues of
2 damage. Here are the witnesses who we're going to
3 call, and this is their general testimony.

4 MR. STROTH: We're talking about after
5 certain evidence is presented to just say very
6 briefly here is a summary.

7 We've done it with other judges in
8 different districts.

9 THE COURT: I'm not familiar with it
10 so I'm going to have to think about that and see
11 if -- I'm not familiar with any judges doing it in
12 the Oregon district. We're not the most creative
13 group, though. There's only six of us, and we're
14 pretty conventional. I'm inclined not to allow you
15 to do it so I would not start preparing them. I'm
16 going to talk to a couple of our judges who I think
17 try to do different things maybe just to see them if
18 any of them have used it and what their experience
19 is, and they may be able to convince me to change my
20 mind. But right now I'm a little hesitant to do
21 that. Okay?

22 MR. ODIM: Just one last input on that
23 issue. When we've experienced it in the 7th Circuit
24 in particular, the judges have allocated a certain
25 amount of time to each side. So, for instance,

1 you've got 30 minutes each side, and each side can
2 use it any way they want wherever they want in the
3 witness line.

4 THE COURT: All right. I don't think
5 today you're going to push me into allowing it, but
6 I'll at least give it some thought and talk to some
7 folks. I just don't have experience with it, and
8 it's starting to sound like it's going to be
9 cumulative.

10 You know, the facts in this case -- I
11 know there's a lot of evidence, but both sides'
12 theories are pretty straightforward factually. I
13 don't think there's going to be a lot of confusion
14 about what your positions are on the facts and how
15 they should be interpreted.

16 Anything -- oh, technology in the
17 courtroom, please work with Ms. Pew about learning
18 how to use the technology. She will be able to walk
19 you through all of that.

20 I would suggest, only because I think
21 it's awkward in this courtroom, is we have screens
22 in front of the jurors for them to track your
23 evidence. It's great during trial when witnesses
24 are testifying, but my experience is when attorneys
25 rely on exhibits during closing argument or maybe

1 even opening, it's kind of like being at the table
2 with your kids where they are all looking at their
3 cell phones and they are not looking at you.

4 So we can turn those off and bring the
5 screen beside you so it's a little bit more of a Ted
6 Talk and you're getting their attention as opposed
7 to having them focus on television screens. So Char
8 will explain all that to you.

9 Your team is going to meet or at least
10 talk to Mr. Osborn. David will help you set up so
11 that we can get that one witness via video. I
12 assume we can get him on the big screen in front of
13 everyone. That worked very well last week for us in
14 Pendleton.

15 Anything else we need to discuss
16 today?

17 MR. ODIM: Not from the plaintiffs'
18 side.

19 MR. FRANZ: Your Honor, is Plaintiff
20 intending to ask Sprague anything about whether the
21 weapon was loaded or unloaded?

22 MR. ODIM: Is that a question directed
23 to Plaintiff or to the Court?

24 MR. FRANZ: Well, I kind of addressed
25 it this way.

1 THE COURT: What's the answer? Do we
2 know?

3 MR. FRANZ: We know.

4 MR. ODIM: I'm sorry, I was too busy
5 trying to be witty to hear the end of the question.
6 Please ask me the question again.

7 MR. FRANZ: Are you going to offer
8 evidence that the weapon was unloaded?

9 MR. ODIM: Which weapon? The 9
10 millimeter?

11 MR. FRANZ: The one on the porch.

12 MR. ODIM: I hadn't particularly
13 focused on that as an issue. I think it's going to
14 come in as an unloaded rifle. Isn't that the
15 evidence that's unrebutted?

16 MR. FRANZ: It's something the
17 officers did not know.

18 THE COURT: Correct. But I would
19 think the defense would want it in under the
20 argument that he's pointing an unloaded firearm with
21 the idea he's trying to commit suicide.

22 MR. FRANZ: Right. I mean, I think
23 it's very favorable to the defense. I just want to
24 make sure we're on the same page, that it's coming
25 in without any objection.

1 THE COURT: I assume it's part of the
2 case and it's coming in, so I'll allow the evidence
3 to come in and it doesn't matter who presents it.

4 MR. FRANZ: When we do opening, first,
5 time limit, and then how much of the evidence do we
6 play? Or do you want some kind of streamlining,
7 Your Honor, that the entire tape be played? What's
8 your feeling on that?

9 THE COURT: How long is the tape
10 itself?

11 MR. FRANZ: See, that's the problem.
12 30 minutes.

13 THE COURT: Okay.

14 MR. FRANZ: 35 minutes.

15 THE COURT: Why don't you folks confer
16 about that piece. I mean, it may be that both of
17 you will want simply the tape to be played in
18 advance. It's coming in anyways, and it's going to
19 be referenced. Maybe before even opening statements
20 we just play the thing for the jury and then have
21 you give your openings.

22 MR. FRANZ: The last shooting case I
23 had that's what we did.

24 MR. ODIM: We'll have to think about
25 that.

1 THE COURT: Confer. My experience is
2 that -- well, I've seen both things happen. I think
3 it can be a little cumbersome in opening to play all
4 of it, but I certainly won't stop you from doing it
5 if you think it's significant -- either side thinks
6 it's significant to get the whole thing to the jury.

7 Any exhibits, any evidence that I've
8 now admitted either without objection or I've
9 overruled any specific objection is deemed admitted,
10 it can be used in your opening.

11 If you are creating PowerPoint slides,
12 just share them with the other side just out of
13 caution, because every now and then something slips
14 in that shouldn't be there. And I would prefer that
15 you each review what exhibits you're going to use
16 during your opening so there's no -- there's nothing
17 worse than trying to start a trial and then the
18 wrong exhibit comes in front of the jury and there
19 was some mistake as to what a ruling was, so if you
20 could share those in advance.

21 Anything else we need to discuss?

22 MR. ODIM: Again, nothing else from
23 the plaintiff.

24 MR. FRANZ: Nothing, Your Honor.
25 Thank you.

1 THE COURT: If things do come up, just
2 email Ms. Pew and I can respond -- and the other
3 side -- and I can respond quickly.

4 And again, if you need to stay today
5 and Ms. Pew can show you how to use the technology,
6 that would be great.

7 And if you need any advice for
8 restaurants, I would suggest -- I don't know if
9 Ms. Pew is the right person to ask. We have some
10 law students, though, that know where to eat in
11 town.

12 MR. ODIM: I was heartened when Your
13 Honor asked the correct way to pronounce Stutesman.
14 We've been wrestling with that. And I think we've
15 been cautioned to pronounce Oregon correctly.

16 THE COURT: So I am a native
17 Washingtonian, so we always pronounce it purposely
18 wrong. But I'll tell you there are some judges who
19 -- one judge in particular here who really loves to
20 torture pro hac vice when they pronounce Oregon
21 wrong, so you do have to be careful about that.

22 All right. Thank you, folks. I
23 appreciate. It appreciate all your work on this.

24 THE CLERK: Court is in recess.

25 (The hearing was concluded at 10:20 a.m.)

1 UNITED STATES DISTRICT COURT)
2 FOR THE DISTRICT OF OREGON)
3

4 I, Sara Fahey Wilson, CSR No. 06-0400, a
5 Certified Shorthand Reporter, certify:

6 That the foregoing proceedings were taken before
7 me at the time and place therein set forth, at which
8 time the witness was put under oath by me;

9 That the testimony of the witness, the questions
10 propounded, and all objections and statements made
11 at the time of the examination were recorded
12 stenographically by me and were thereafter
13 transcribed;

14 That a review of the transcript was not
15 requested;

16 That the foregoing is a true and a full and
17 correct transcript of said proceedings reported by
18 me to the best of my ability on said date;

19 I further certify that I am not a relative or
20 employee of any attorney of the parties, nor
21 financially interested in the action.

22 IN WITNESS WHEREOF, I have set my hand this 13th
23 day of February 2020, in the City of Eugene, County
24 of Lane, State of Oregon.
25



22 Sara Fahey Wilson, CSR

23 CSR No. 06-0400

24 Expiration Date: March 31st, 2020
25